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No. 15-866

IN THE

Supreme Court of the United States

STAR ATHLETICA, LLC,

Petitioner,

v.

VARSITY BRANDS, INC., VARSITY SPIRIT CORPORATION, AND VARSITY SPIRIT FASHIONS & SUPPLIES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PUBLIC KNOWLEDGE, THE ROYAL MANTICORAN NAVY, AND THE INTERNATIONAL COSTUMERS GUILD AS *AMICI CURIAE* IN SUPPORT OF PETITITONER

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INTEREST OF *AMICI CURIAE*

Public Knowledge[1] is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies. Public Knowledge has previously served as *amicus* in key copyright cases. *E.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013); *Golan v. Holder*, 132 S. Ct. 873 (2012); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

The Royal Manticoran Navy: the Official Honor Harrington Fan Association is a not-for-profit organization dedicated to the Honor Harrington novels of David Weber. Through that it supports series-accurate costuming projects based on the descriptions and artwork contained within the novel, using both originally created and licensed products. It has encouraged costuming both in its original, non-licensed status and in its current incarnation as an official and licensed organization. TRMN also advocates for wildlife conservation and aerospace education based on the themes and characters contained within Mr. Weber's works.

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[1]Pursuant to Supreme Court Rule 37.2(a), all parties received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

The International Costumers Guild is a non-profit organization for amateur, hobbyist, and professional costumers, with affiliated chapters and special interest groups in the United States and internationally. Members include historic re-enactors, professional, educational and community theatrical costumers, science fiction fans, renaissance festival participants, and all those who are interested in the making, wearing and display of costumes. The International Costumers Guild is dedicated to the promotion and education of costuming as an art form in all its aspects. It also advocates on behalf of its members and the costuming community in matters of the public interest related to the art and practice of costuming.

SUMMARY OF ARGUMENT

This dispute between two cheerleading uniform manufacturers belies a question of vast public significance: to what extent copyright law permits monopolization of designs created not for their aesthetic value but to serve the function of identifying wearers with teams, groups, associations, or causes. The petition details the fractured and confused circuit split on this issue of copyright in functional and useful articles, clarification of which is reason enough for this Court to grant certiorari. This brief explores the wide-ranging ramifications of that doctrine.

Although many pictorial, graphic, and sculptural works are created primarily or entirely for their artistic value, many more are intended for functional uses. A wavy bicycle rack, for example, may be aesthetically pleasing, but its undulations serve the more important purpose of facilitating the locking of bicycles.

Copyright law does not allow for a monopoly in those functional aspects of a useful article, in order to protect the public interest in innovation and competition. Useful articles are necessary and irreplaceable to consumers in a way that purely artistic works are not. To allow for a creator to own the functional aspects of a useful article, then, would be to deny the public access to those useful functions, and to deny the public the benefits of competitive marketplaces and follow-on innovations attendant to such access.

That is why intellectual property rights in useful articles are subject to the rigorous strictures of patent law. It is why the much more easily obtained and much longer lasting regime of copyright is inappropriate for protecting useful articles. This important limitation on copyright law deserves clarification through a grant of certiorari.

But of at least equal importance, the intersection of functionality and copyright touches not just consumer products but also consumers themselves for at least two reasons: the rapidly increasing pace of consumer-driven creation and innovation, and the fundamental individual interest in self-association.

Today, individual members of the public are increasingly engaging in individual creativity, and the present case could potentially affect the scope and rate of that creative output. Of particular relevance to this case, home sewing and costume design are popular practices among many segments of the population. The uniquely grassroots creativity and innovation displayed in these practices attest to that relevance. These interests, largely ignored by the courts of appeal, are important and deserving of this Court's consideration.

Moreover, the clothing designs at issue in this case, cheerleader uniforms necessary to mark a wearer as a member of a team, point to a fundamental concern for freedom of association. People wear special clothing to associate themselves with all sorts of groups or interests: a cheerleading team, fans of an opera or other dramatic work, reenactment of a historical era. That interest in association is not just fundamental to human nature; it is enshrined in the First Amendment to the Constitution.

The value of the copyright monopoly to owners must be balanced against that essential interest in association. The doctrine of uncopyrightability of functionality fits the bill for this balancing, for the role of indicating an association is by definition a function, a utilitarian aspect of an article. The confused state of copyright law undermines this balance, and immediate clarification is imperative. Certiorari should be granted.

ARGUMENT

I. THE UNCERTAINTY IN COPYRIGHT OF USEFUL ARTICLES UNDULY IMPEDES COMPETITION AND THE CONSUMER INTEREST

The deep circuit split in the law of conceptual separability and the copyrightability of functional articles is detrimental to free-market competition and thus to the interests of consumers. Certiorari is necessary to resolve the conflict in the law and provide market certainty.

A. THE DIVIDE BETWEEN USEFUL AND NON-USEFUL IS CENTRAL TO THE SCOPE OF COPYRIGHT LAW

Copyright protection does not extend to utilitarian aspects of objects, and for good reason: to allow otherwise would permit a flood of exclusive monopoly rights that would unnecessarily burden competition, raise prices, and harm consumers. It is a cornerstone of copyright law that useful aspects of articles may not be the subject of protection. "Pictorial, graphic, and sculptural works," according to the Copyright Act, are protected only "insofar as their form but not their mechanical or utilitarian aspects are concerned." 17 U.S.C. § 101. A "useful article," namely one "having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information," may receive copyright protection in its design "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." *Id.*

The exclusion of utilitarian aspects of design from copyright protection dates back to the 1870 Copyright Act, which first made three-dimensional works copyrightable but only to the extent of "designs intended to be perfected and executed *as works of the fine arts*." Act of July 8, 1870, ch. 230, sec. 86, 16 Stat. 198, 212 (emphasis added). Subsequent revisions of the Copyright Act maintained this distinction up until the 1976 Copyright Act in force today (using the language quoted above); the committee report indicated an intent "to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design." H.R. Rep. No. 94-1476, at 55 (1976).

While cases often elide over the reasons for omitting useful aspects of articles from copyright, the reason put forward generally relates to avoiding the burdens of extending the copyright power into territory better protected by other legal regimes.

Most often it is said that because patents (and particularly design patents) already protect utility, copyright protection on the same subject matter is inappropriate. In particular, patent protection requires detailed examination to prove novelty, nonobviousness, and utility; copyright protection requires none of these. Furthermore, copyrights last far longer than patents. As one commentator summarizes: "Monopolies in useful articles are jealously guarded: they are hard to get and are short lived," in contradistinction from copyright. Ralph S. Brown, *Copyright-like Protection for Designs*, 19 U. Balt. L. Rev. 308, 316 (1989).

Accordingly, Congress has made a judgment that useful articles may only receive the relatively limited intellectual property monopoly of patents under stringent con-

ditions; to permit useful articles to receive the broader monopoly of copyright under lax requirements would defeat the legislative scheme. This was made abundantly clear in *Baker v. Selden*, when this Court held that a series of blank accounting forms could not be the subject of copyright. *See* 101 U.S. 99, 107 (1880). The book of forms made up a system or art of bookkeeping, and:

> To give the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright.

Id. at 102.[2]

Baker further makes clear that the uncopyrightability of utility stems from concerns for the public. Besides calling it "a surprise and a fraud upon the public" to allow such copyrights, *Baker* notes how the constitutional purpose of copyright, "to communicate to the world the useful knowledge" taught in a work, "would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." *Id.* at 103. That rationale of dissemination of knowledge is the *sine qua non* of copyright protection: "The sole interest of the United States and the primary object in conferring the monopoly lie in

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[2] *Mazer v. Stein*, 347 U.S. 201 (1954), is not to the contrary. That case rejected the argument that a statuette used as a lamp base could not be copyrightable because it was patented. *See id.* at 217. But it did so because the copyright inhered in a different aspect of the work being protected: "a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea." *Id.* The utilitarian aspects—those amenable to patent—remained unprotectable under copyright. *See id.* at 218.

the general benefits derived by the public from the labors of authors." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)), *cited in Mazer v. Stein*, 347 U.S. 201, 219 (1954).

The case law thus shows that the uncopyrightability of useful aspects of articles stems from concerns for the public. This Court should continue applying that public interest in this case.

B. Unclear Separability Tests Create Substantial Anticompetitive Effects

Restricting useful aspects of articles from copyright protection, besides reflecting congressional intent, simply makes sense as a matter of policy. Useful articles are necessary to the general public in a way that aesthetic articles are not: while a statuette may be substituted easily with another figure, a lamp base could not be so easily substituted with another product without frustrating the utility of supporting a lamp. Thus, while a monopoly in aesthetic elements will do little to suppress competition, a monopoly in useful elements will lock consumers into certain products.

Indeed, the parties to this very case exemplify how copyright law can be improperly leveraged into an anticompetitive business practice. Varsity Brands is the dominant player in the cheerleading industry; as one writer reports: "It owns cheerleading from head to toe; everything from the sequined uniforms on cheerleaders' backs to the big bows in their poofed-up hair." Leif Reigstad, *Varsity Brands Owns Cheerleading and Fights to Keep It from Becoming an Official Sport*, Hous. Press (July 21, 2015), URL *supra* p. vi. A cheerleader does not pick a

style of dress for aesthetic reasons, but rather to maintain uniformity—hence the cheerleader *uniform*—with the team's existing style. To allow Varsity Brands to stop competitors from offering uniforms at competitive prices would further solidify that company's monopoly position.

Accordingly, the longstanding congressional policy that utilitarian aspects of works are not copyrightable is intended to, at a minimum, protect the public from undue loss of competition and access to useful articles. Clarification of the dividing line between what is copyrightable and what is utilitarian thus will have substantial implications for marketplace competition and the consumer interest. Certiorari should be granted.

II. Copyright in Useful Articles Implicates Consumer-Driven Innovation and Cultural Development

Besides promoting the consumer interest in marketplace competition, clarification of the law of conceptual separability in copyright will further advance important interests in promoting progress and innovation, as the Copyright Clause requires, for at least two reasons. First, today's consumers do not merely purchase products such as the clothing at issue; they create, repair, and improve upon them. These valuable and innovative practices could be easily stifled if copyright in useful articles is read too broadly. Second, members of the public enjoy and expect strong rights of association, and they often rely on pictorial, graphic, or sculptural works to identify their associations. Whether marks of group membership serve a functional purpose rendering those marks uncopyrightable is a subsidiary question behind the present peti-

tion for certiorari, one that implicates important associative rights embodied in the First Amendment.

A. The Scope of Copyright Protection in Clothing Potentially Affects Creative Communities of Makers and Consumers

The determination of what elements of a useful article are copyrighted and subject to monopoly protection will affect not only large, competitive companies but also individuals engaged in the personal industry of creating and making. This sort of consumer-driven innovation is particularly important to today's economy, so the effects of copyright on such innovation merits this Court's close scrutiny.

1. Consumer-driven innovation, particularly in the field of clothing, is rapidly growing in size and importance. At least two industries exemplify this: home sewing and creative fan costuming.

Americans are picking up their tools and creating at an amazing rate. "We are all Makers. . . . Knitting and sewing, scrap-booking, beading, and cross-stitching—all Making." Chris Anderson, *Makers: The New Industrial Revolution* 13 (2012).

Sewing in particular is experiencing a renaissance, thanks both to its recent resurgence in popular culture (via such television shows as Project Runway) and to its longstanding presence among fan communities. Sewing has shed its image as "the domain of apron-clad matrons tasked with domestic busywork . . . and become an accessible outlet for self-expression, creativity, and a way to participate in shared interests." Laura M. Holson, *Dusting Off the Sewing Machine*, New York Times, July 4, 2012, at E6, *available at* URL *supra* p. v. Industry trends reflect

this, with home sewing machine sales doubling in the past decade, reaching 3 million sold in 2012. *Id.*

The people driving this sewing renaissance are hobbyists, not professionals. One popular sewing instructor in Brooklyn says that almost three-quarters of her students "are professionals, such as lawyers, doctors and finance executives." *Id.* Over half of all American households produced one or more traditional crafts in 2012. Kim Leonard, *$30 Billion Crafts Industry Enjoys Resurgence*, TribLive, Nov. 17, 2012, *available at* URL *supra* p. v.

As creative sewing grows in popularity, so does costuming. An outgrowth of creative and often economically valuable fan-created works, costuming is the practice in which hobbyists construct elaborate costumes to celebrate a character, a fictional world, an historical era, or other area of interest. The Internet has greatly facilitated this practice, placing within arm's reach of garage creators advanced materials and sophisticated technical knowledge such as custom fabric prints, computer-controlled lighting effects, and custom plastic molds.[3] Costumers with like interests can (and do) obsess over minutiae of garment construction, often using

[3] *See, e.g.*, Railes, *Adult Storm Trooper Costume*, Instructables (last visited Jan. 25, 2016), URL *supra* p. vi (teaching readers how to construct a Star Wars "storm trooper" suit of armor from cardboard boxes, fiberglass cloth, resin and paint); Stephen Fraser et al., *The Spoonflower Handbook: A DIY Guide to Designing Fabric, Wallpaper & Gift Wrap* (2015) (describing service where users can design and order custom fabric by the yard); Hhhhammy & Gothichamlet, *Ragyo Kiryuin Wig Tutorial*, Cowbutt Crunchies Cosplay (last visited Jan. 25, 2016), URL *supra* p. v (describing how to create a stylized, LED-lit rainbow wig to mimic the specific look of a character from Japanese animation *Kill La Kill*).

hi-resolution screen captures and 3D modeling to pick apart designs down to the last stitch.[4]

While much of costuming is based on popular contemporary works, practitioners range widely in their subject matter. The Jane Austen Festival in Bath, England hosts an annual "promenade" in which over 500 attendees—all of whom are "expected to wear late Georgian or Regency dress"—parade through the downtown area to a park, where they gather for a large outdoor picnic. Kelly Faircloth, *How Much Jane Austen Is Too Much Jane Austen?*, Jezebel (Sept. 4, 2015), URL *supra* p. v. Many, if not most, of the dresses are painstaking recreations of either authentic period designs or costumes designed for one of the myriad film adaptations of Austen's works. One participant "made her entire costume, replicating a fashion plate from 1815"; another agonizingly duplicated a famous gown from The Victoria and Albert Museum, opining that "It took twenty years to find the right fabric." *Id.*

2. It is easy to be dismissive of home sewers and costumers, among other consumer-level makers, as engaging in unimportant fringe activities. They are not. These practices are widespread, and more importantly they are key contributors to public innovation and creativity, ful-

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[4] *See, e.g.*, Pixels, *Women's Vault 101 Jumpsuit Pattern*, Atomic Ladies (May 5, 2015), URL *supra* p. vi (reverse-engineering an in-game jumpsuit down to the style of seam stitching); Alex Murphy, *Cuff 'Em, Boys!*, Ginger Doctor (Jan. 23, 2016), URL *supra* p. vi (analyzing the specific style of cuffing on a pair of jeans worn by the character Doctor Who); Jake Young, *25 Nintendo Cosplayers Who Totally NAILED IT*, Dorkly (May 15, 2015), URL *supra* p. vii (a gallery celebrating the accuracy and skill of 25 costumers dressed as Nintendo characters).

filling the important mission of promoting the progress of science and useful arts.

Costuming is an incredibly popular activity. The annual New York Comic Con is attended by over 167,000 pop culture enthusiasts, with thousands of participants donning homemade, iconic garb of their favorite characters. Rob Salkowitz, *How Many Fans?!?! New York Comic Con Sets Attendance Record*, Forbes (Oct. 15, 2015), URL *supra* p. vi. And this is no anomaly: of the 15 largest comic and pop culture conventions in the United States—each of which attracts on the order of a hundred thousand enthusiastic participants—13 sponsor an organized competition for homemade costumes.[5] Of the remaining two, one (Penny Arcade Expo) allows exhibitors to host their own contests, and the other (Dragon Con)

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[5] *NYCC Eastern Championships Of Cosplay*, New York Comic Con (last visited Jan. 25, 2016), URL *supra* p. vi; *Masquerade*, San Diego Comic Con (last visited Jan. 25, 2016), URL *supra* p. vi; *Cosplay & Costume Celebration*, Salt Lake City Comic Con (last visited Jan. 25, 2016), URL *supra* p. iv; *Events: Masquerade Contest*, Otakon (last visited Jan. 25, 2016), URL *supra* p. iv; *Masquerade*, Anime Expo (last visited Jan. 25, 2016), URL *supra* p. v; *Get Your Cosplay On @ Wizard World Chicago Comic Con Costume Contests*, Wizard World Chicago Comic Con (last visited Jan. 25, 2016), URL *supra* p. v; Hannah Means Shannon, *Cosplay Contests Were A Major Draw At Emerald City Comic Con*, Bleeding Cool (Apr. 1, 2014), URL *supra* p. vii; *Cosplay National Championship Official Rules*, Comikaze Expo (last visited Jan. 25, 2016), URL *supra* p. iv; *Costume Contest & Costume Parade*, Gen Con (last visited Jan. 25, 2016), URL *supra* p. iv; *C2E2 Crown Championships of Cosplay*, Chicago Comic & Entertainment Expo (last visited Jan. 25, 2016), URL *supra* p. iv; *D23 EXPO 2015 Invites Fans to Celebrate the Magic of All Things Disney in Mousequerade and D23 Expo Design Challenge*, D23 (Mar. 5, 2015), URL *supra* p. iv; *An Evening to Celebrate Costumes: The WonderCon 2016 Masquerade!*, Wonder Con (last visited Jan. 25, 2016), URL *supra* p. iii.

has an annual competition "sponsored" by one programming track, plus an annual parade through downtown Atlanta of attendants in costume.[6]

But more importantly, these consumer-driven practices contribute immensely to the public interest in development of new inventions and creative works. Rapid improvements and decreased costs of fabrication technologies, ranging from home sewing machines to 3-dimensional printing systems, have opened the door to all sorts of innovation and creation by individuals who in a prior time would have lacked the resources to create new things easily.

And create they do—in spades. One study estimated that there are 11.7 million "consumer-innovators" in the United States alone, expending $20.2 billion a year on their creative activities. Eric von Hippel et al., *The Age of the Consumer-Innovator*, MIT Sloan Mgmt. Rev., Fall 2011, at 30 tbl., *available at* URL *supra* p. vii. Succinctly summarized: "It is by no means only companies that, as a well-known General Electric slogan put it, 'bring good things to life.'" *Id.* at 31.

Creativity abounds in the space of consumer-invented costuming, an unsurprising result given the attention to detail many costumers contribute. Some spend time identifying new techniques for constructing studio-quality materials at home; these secrets are shared with others in the community. Some invent real physical mechanisms to implement fictional tools. Indeed, it is not infrequent for a fan-created costume or other work to be adopted into

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[6] *Cosplay Contest*, Dragon Con (last visited Jan. 25, 2016), URL *supra* p. iv; *Annual Dragon Con Parade*, Dragon Con (last visited Jan. 25, 2016), URL *supra* p. iii.

canon by the original author, demonstrating the contributive creativity of this community of celebrants of culture.

The law as it exists is untenable for costumers. The multitude of contradictory separability tests that currently stand means that a costume replica may be noninfringing at a San Diego convention but infringing in New York. Moreover, the fact that multiple tests may apply in each circuit means that even where the question has been theoretically "addressed," it has been made anything but clear. The situation is absurd, abstruse, and—owing to the historical lack of copyright protection for *any* article of clothing—functionally obfuscated from the people whom it stands to impact most. An unworkable or overbroad separability test would thrust untold numbers of hobbyists, amateurs, and fans even further into this legal twilight zone, as if a thousand sewing machines serged in panic, and were suddenly silenced.

B. The Petition Asks Whether Associative Aspects of Clothing Are Functional, a Question Touching on Important Individual Rights

In arguing that the stripe patterns of cheerleading uniforms are utilitarian and thus not amenable to copyright, the petition raises the question of whether a graphical pattern is functional for identifying the wearer as a member of a team or group. This copyright question is one of great importance to the public, as it could strongly affect rights of association embodied in the First Amendment among other places.

"It is only shallow people who do not judge by appearances." Oscar Wilde, *The Picture of Dorian Gray* (1890). The sociological role of clothing as a signal of our

communal affiliation is ancient and long-studied. *See, e.g.*, Nathan Joseph, *Uniforms and Nonuniforms: Communication Through Clothing* (1986). It is highly contextual and conveys meaning based on the wearer's community and its context in time: "people wear green of St. Patrick's Day and red, white, and blue for the 4th of July; Santa Claus generally appears in a Christmas parade; Ronald MacDonald appears at restaurant openings; and, in Tampa, Florida, pirates descend upon the town for the annual Gasparilla events." Dava L. Simpson, Stormtroopers Among Us: Star Wars Costuming, Connection, and Civic Engagement (2006) (unpublished thesis, University of Southern Florida), *available at* URL *supra* p. vii. Like all clothing, costuming is a community-oriented act, intended as an expressive act of affiliation with a particular interest group or association. As one journalist described a woman wearing her Jane Austen–inspired garb on the way to a conference of like-minded costumers:

> [S]he liked the stir she caused strolling through the airport in a floor-length, Empire-waist day dress. In her elegant gowns and headdresses, she felt different. "I'm no longer the usual mom, out there playing soccer or being graceless," she says. "I know that as soon as I step out the door, I'm on display, and people are watching."

Deborah Yaffe, *Among the Janeites: A Journey Through the World of Jane Austen Fandom* 4 (2013).

Costuming is, at its core, a communal activity with a large associational component, often organized around conventions and other public and semi-public gatherings.

It is unsurprising, then, that groups dedicated to costuming generally (and themed costuming in particular) have had a global reach. The International Costumers' Guild brings together both amateur and professional costumers to discuss their trade, and helps to organize an annual international convention. *About the International Costumers' Guild*, The International Costumers' Guild (last visited Feb. 2, 2016), URL *supra* p. iii. A group dedicated to Star Wars costuming, the 501st Legion, boasts members in over 50 countries worldwide, and engages in substantial charitable work. The Legion's charter states

> The Legion is an all-volunteer organization formed for the express purpose of bringing together costume enthusiasts under a collective identity within which to operate. The Legion seeks to promote interest in Star Wars through the building and wearing of quality costumes, and to facilitate the use of these costumes for Star Wars-related events as well as contributions to the local community through costumed charity and volunteer work.

Our Mission, 501st Legion: Vader's Fist (last visited Jan. 25, 2016), URL *supra* p. vi.

These acts of association through apparel touch upon individual freedoms of association. The First Amendment, as interpreted by this Court, guarantees "freedom to engage in association for the advancement of beliefs and ideas." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *accord Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) ("[T]he ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed."). This freedom "is more than the right to attend

a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

Articles such as clothing are a primary way of identifying an individual as a member of a group. *Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding as protected speech an organized protest of wearing black armbands). Allowing for copyright protection to prevent others from expressing their inclusion would amount to a monopoly going beyond the purpose of incentivizing creation of new works, enabling the monopoly holder to exclude members at will. That is not a proper use of copyright.

Within copyright doctrine, the exclusion of utilitarian aspects of useful articles from protection ideally implements this important concern for freedom of association. Indicators of association are almost uniformly pictorial, graphic, or sculptural in nature, meaning that the exclusion of utilitarian aspects of useful articles would apply to such works used for associative purposes. The Copyright Act defines a "useful article" as one "having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information," and the use of an article to identify oneself with a group goes beyond those two enumerated purposes. 17 U.S.C. § 101. Accordingly, by ensuring that works intended to demonstrate a group association are treated as functional and thus not copyrightable, this Court would protect the substantial interest in "expression of opinion" that lies at the core of individual freedom of association. *Griswold*, 381 U.S. at 483.

Of course, it is recognized that a group has an interest in selectivity as to who may be a member of the group. That is what trademark law is for. But here, the copyright owner is not a member of the cheerleading team; it is an external third party dictating to others—indeed, dictating to team members—who may wear the insignia of the group.[7] And certainly some designs will involve such artistic merit as to warrant protection for those aesthetic features. But that is why the doctrine of conceptual separability exists—to distinguish those features deserving of the copyright monopoly from those which do not, "regardless of the fact that they may be aesthetically satisfying and valuable." *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 418 (2d Cir. 1985).

* * *

It is a truth universally acknowledged, that an entity in possession of a copyright will too often want to enlarge its scope. That is why copyrights are limited—to ensure that those exploiting them do not tread upon important concerns such as marketplace competition, consumer innovation, and freedom of association. The uncertain state of the law of conceptual separability threatens these interests of consumers and the public. To clarify the law and to elucidate the relative relations between copyright owners and the public, certiorari should be granted.

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[7] While it is not certain that the Respondents are refusing to sell uniforms to any person, copyright law undoubtedly would allow Respondents to do so at their pleasure.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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